

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Brandee Rosales,

10 Plaintiff,

11 v.

12 Sarah Rollag, et al.,

13 Defendants.  
14

No. CV-22-01581-PHX-DJH

**ORDER**

15 This case arises from a rear-end collision which Plaintiff Brandee Rosales (“Plaintiff  
16 Rosales”) alleges caused the premature birth of her daughter, A.T. (“Plaintiff A.T.”), as  
17 well as other injuries (collectively, “Plaintiffs”). (Doc. 5-1 at ¶¶ 13–16). Defendant Sarah  
18 Rollag (“Defendant”) has filed two motions to exclude Plaintiffs expert witnesses.  
19 (Docs. 27 & 28). Defendant argues that Plaintiffs’ experts, Dr. Nathan Hirsch and Dr.  
20 Luay Shayya, do not base their opinions on sufficient facts or data as required by Federal  
21 Rule of Evidence 702, so, the Court must exclude them.<sup>1</sup> The Court will limit the experts  
22 testimony, but will not exclude them.

23 **I. Background**

24 Plaintiff Rosales alleges that she was parked in the center turn lane of 35th Avenue  
25 in Phoenix, Arizona when she was rear ended by Defendant, who failed to control her  
26 speed, on September 29, 2020. (Doc. 5-1 at ¶¶ 13–16). Plaintiff Rosales was twenty weeks  
27 pregnant at the time of the collision, so as a precaution, she sought medical care the next

28 <sup>1</sup> References to “Rules” herein are in reference to the Federal Rules of Evidence, unless  
otherwise stated.

1 day. (Doc. 27 at 2; Doc. 33 at 4). She was diagnosed with headache, neck and lumbar  
2 sprain; but was not shown to have and placental abnormalities. (Doc. 33-7 at 3). On  
3 October 6, 2020, Plaintiff Rosales again sought care as she experienced a large leakage of  
4 fluids which soaked the seat of her vehicle. (Doc. 27 at 2; Doc. 33 at 4). She was diagnosed  
5 with “suspect preterm premature rupture of membranes” and discharged with instructions  
6 to rest. (Doc. 27 at 2; Doc. 33 at 4). Plaintiff Rosales again sought medical care due to a  
7 gushing of vaginal fluid and on December 18, 2020, she underwent a c-section and gave  
8 birth to Plaintiff A.T. (Doc. 27 at 4; Doc. 33 at 5). Plaintiff A.T. was born eight weeks  
9 premature and required a four-week long stay at the hospital. (Doc. 33 at 5).

10 After giving birth, Plaintiff Rosales went to the ER due to shortness of breath and  
11 chest discomfort over the past day. (Doc. 27-3 at 1). She was diagnosed with a pulmonary  
12 embolism, Covid-19 and pneumonia. (*Id.* at 7). Plaintiffs allege their injuries can be linked  
13 to the crash. (Doc. 5-1 at ¶ 24). Plaintiffs argues that, because of each of their injuries,  
14 Plaintiff Rosales incurred \$157,142.27 in medical expenses and Plaintiff A.T. incurred  
15 \$172,896.00 in medical expenses. (Doc. 33 at 5). Plaintiffs have brought claims for  
16 negligence (Doc. 5-1 at ¶¶ 20–26) and negligence *per se* (*Id.* at ¶¶ 27–32) against  
17 Defendant.

18 To substantiate their claims for damages, Plaintiffs retained two expert witnesses:  
19 Dr. Hirsch and Dr. Shayya. (Doc. 33 at 5; Doc. 34 at 3). Dr. Hirsch is a board certified  
20 OBGYN and was retained to “to review all of Plaintiffs’ medical records and evaluate  
21 whether Ms. Rosales’ premature rupture of the membranes, premature birth of her baby  
22 and resulting NICU stay were related to the collision.” (Doc. 33 at 5). Based on this  
23 review, Dr. Hirsch concluded that the car accident caused Plaintiff Rosales injuries and the  
24 premature birth of Plaintiff A.T. (Doc. 27-12 at 2). Plaintiffs also retained Dr. Shayya, a  
25 board-certified neurologist, to “render causation opinions regarding [Plaintiff Rosales’]  
26 alleged injuries.” (Doc. 28 at 4). Dr. Shayya has reviewed Plaintiff Rosales post-accident  
27 medical records and one pre-accident record and concluded that the medical care she  
28 received was related to the collision with Defendant. (*Id.*) Now, Defendant seeks to

1 exclude these experts under Rule 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S.  
 2 579 (1993). (Docs. 27 & 28).

## 3 **II. Legal Standard**

4 Rule 702 of the Federal Rules of Evidence tasks the trial court with a special  
 5 “gatekeeping” obligation to ensure that any expert testimony provided is relevant and  
 6 reliable. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1999). A qualified  
 7 expert may testify based on their “scientific, technical, or other specialized knowledge” if  
 8 it “will assist the trier of fact to understand the evidence.” Fed. R. Evid. 702(a). An expert  
 9 may be qualified to testify based on his or her “knowledge, skill, experience, training, or  
 10 education.” *Id.* The expert’s testimony must also be based on “sufficient facts or data,” be  
 11 the “product of reliable principles and methods,” and the expert must have “reliably applied  
 12 the principles and methods to the facts of the case.” *Id.* at 702(b)–(d). “Rule 702 should  
 13 be applied with a ‘liberal thrust’ favoring admission.” *Messick v. Novartis*  
 14 *Pharmaceuticals Corp.*, 747 F.3d 1193, 1197 (9th Cir. 2014) (quoting *Daubert*, 509 U.S.  
 15 at 588).

16 *Daubert’s* general holding applies to an expert’s testimony based on “scientific”  
 17 knowledge, but also to testimony based on “technical” and “other specialized” knowledge.  
 18 *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). *Daubert* suggests several  
 19 factors for courts to consider in discharging its gatekeeping obligation; however, these  
 20 factors do not apply to testimony that depends on knowledge and experience of the expert,  
 21 rather than a particular methodology. *United States v. Hankey*, 203 F.3d 1160, 1169 (9th  
 22 Cir. 2000) (citation omitted) (finding that *Daubert* factors do not apply to a police officer’s  
 23 testimony based on twenty-one years of experience working undercover with gangs).  
 24 Furthermore, “[t]he inquiry envisioned by Rule 702” is “a flexible one.” *Daubert*, 509 U.S.  
 25 at 594. “The focus . . . must be solely on principles and methodology, not on the  
 26 conclusions that they generate.” *Id.* The proponent of expert testimony has the ultimate  
 27 burden of showing that the expert is qualified and that the proposed testimony is admissible  
 28 under Rule 702. *See Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

1 The trial court is vested with broad discretion deciding whether an expert is qualified to  
 2 testify. *See, e.g., General Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997); *United States v.*  
 3 *Espinosa*, 827 F.2d 604, 611 (9th Cir.1987) (“The decision to admit expert testimony is  
 4 committed to the discretion of the district court and will not be disturbed unless manifestly  
 5 erroneous”).

6 That the opinion testimony aids, rather than confuses, the trier of fact goes primarily  
 7 to relevance. *See Temple v. Hartford Ins. Co. of Midwest*, 40 F. Supp. 3d 1156, 1161 (D.  
 8 Ariz. 2014) (citing *Primiono v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010)). Evidence is  
 9 relevant if it has “any tendency to make a fact more or less probable than it would be  
 10 without the evidence and the fact is of consequence in determining the action.” Fed. R.  
 11 Evid. 401. However, an expert witness, “cannot give an opinion as to her legal conclusion,  
 12 i.e., an opinion on an ultimate issue of law.” *United States v. Diaz*, 876 F.3d 1194, 1197  
 13 (9th Cir. 2017) (internal citations omitted); *see also* Fed. R. Evid. 704.

### 14 **III. Discussion**

15 Defendant argues that Dr. Hirsch should be excluded as his opinion is not based on  
 16 sufficient facts or data, as required by Rule 702, and because he failed to consider  
 17 alternative explanations for Plaintiff’s alleged injuries. (Doc. 27 at 11, 13). Defendant  
 18 also argues that Dr. Hirsch cannot opine on the reasonableness of Plaintiff’s medical  
 19 expenses because he is not licensed to practice in Arizona. (*Id.* at 14–15). Plaintiffs argue  
 20 that Dr. Hirsch’s conclusions “are based off the records he reviewed and are justifiably  
 21 derived from his expertise and review of the records in this case.” (Doc. 33 at 10).  
 22 Plaintiffs also argue that Dr. Hirsch did consider alternative theories for Plaintiff’s injuries  
 23 and ruled them out. (*Id.* at 12–14). They finally argue that Dr. Hirsch’s 50 years of  
 24 experience as an OBGYN provide a sufficient foundation for his testimony regarding the  
 25 reasonableness of Plaintiff’s treatment and subsequent expenses. (*Id.* at 14).

26 As for Dr. Shayya, Defendant also argues that his opinions are not based on  
 27 sufficient facts or data and that he failed to consider reasonable alternatives.  
 28 (Doc. 28 at 7, 10). Plaintiffs argue that Dr. Shayya reviewed their medical records and

1 bills and came to his conclusion based on these records, his education, and experiences.  
 2 (Doc. 34 at 4). They also argue that he properly considered alternative explanations.  
 3 (*Id.* at 9). The Court will review each argument for and against exclusion in turn.

4 **A. Dr. Hirsch**

5 In his expert report, Dr. Hirsch concludes that “[w]ith reasonable certainty the auto  
 6 accident trauma caused the cascade of events, the preterm premature rupture of membranes  
 7 and premature birth of [A.T.] Also, the bilateral pulmonary emboli were directly related to  
 8 the strict bedrest.” (Doc. 27-12 at 2). Dr. Hirsch states that he relied on the following  
 9 materials to reach this conclusion:

- 10 • Banner Thunderbird Medical Center medical bills and records.
- 11 • North Valley Emergency Specialists medical bills.
- 12 • Southwest Diagnostic Imaging medical bills.
- 13 • Chandler Regional Medical Center medical bills and records.
- 14 • ER Medical Specialists medical bills.
- 15 • Chandler Radiology Associates medical bills.
- 16 • ClinPath Diagnostics medical bills and records.
- 17 • New Horizon Women's Care/AZ OBGYN Affiliates, PC medical bills  
and records.
- 18 • Sonora Quest Laboratories medical bills and records.
- 19 • Alliance Cancer Care/ American Oncology Partners medical bills and  
records.
- 20 • Arizona Neurology and Sleep Center medical bills and records.

21 (*Id.* at 1). As the “relevant facts” to support this conclusion, Dr. Hirsch states that there  
 22 were contradictory tests for preterm premature rupture of membranes and that, “at  
 23 approximately 30 + 5 weeks total rupture of the membranes occurred.” (*Id.* at 2).

24 Dr. Hirsch was also deposed. (Doc. 33-2). During his deposition, Dr. Hirsch was  
 25 asked about Plaintiff Rosales’ marijuana use. He responded that consistent marijuana use  
 26 can cause a premature delivery, but that she was not consistently smoking marijuana during  
 27 this pregnancy. (Doc. 33-2 at 2). Dr. Hirsch stated that marijuana use one to two times  
 28 per week is not excessive and that this would not have adversely affected her pregnancy.  
 (*Id.* at 3). He based this opinion on internet articles, such as those published by the Mayo  
 Clinic. (*Id.* at 4).

1 Dr. Hirsch was also asked about Plaintiff Rosales' bacterial vaginosis and how that  
2 could have affected her premature need to have a c-section. (*Id.* at 5). Dr. Hirsch stated  
3 that bacterial vaginosis is not a "true" bacterial infection and that it does not cause a  
4 premature delivery or rupture of membranes because it is not an "external infection." (*Id.*  
5 at 5–6). Dr. Hirsch was challenged as to that point with the fact that the CDC states  
6 bacterial vaginosis can affect a pregnancy. He responded that "[i]t's been stated that it  
7 does not cause premature rupture of the membranes or premature birth." (*Id.* at 6).

8 Dr. Hirsch was later asked about his opinions regarding the injuries Plaintiffs  
9 sustained because of the collision with Defendant. (*Id.* at 11). He responded that "[t]he  
10 car accident contributed to the early rupture of membranes of which was a leak which set  
11 up milieu of changes that caused the premature birth of the baby after the rupture of  
12 membranes at 30 weeks and a few days, and also contributed to bilateral pulmonary  
13 emboli." (*Id.*) He was also asked about the reasonableness of the treatments and if  
14 associated costs were reasonable, to which he responded that they seemed appropriate. (*Id.*  
15 at 13–14). He added that every baby that stays at the NICU, unfortunately, incurs "a couple  
16 hundred thousand dollars of cost." (*Id.* at 15). He states that "when I say appropriate, it  
17 seems like a lot of money, but it's everywhere." (*Id.*)

18 Dr. Hirsch has also submitted an affidavit. (Doc. 33-1). He states that "[a]s a  
19 practicing Obstetrician and Gynecologist of over fifty (50) years, I have evaluated, treated,  
20 and made management decisions for numerous patients with symptomology such as those  
21 [Plaintiff] presented with" after her accident. (*Id.* at 1). He also asserts that he bases his  
22 opinions on his training, education, and experience and that he states them to a reasonable  
23 degree of medical and scientific probability. (*Id.* at 2). He notes that the medical records  
24 he reviewed contained Plaintiff Rosales' past obstetrical history, which included a  
25 miscarriage and a second pregnancy that resulted in a c-section at 39 gestational weeks as  
26 well as her use of marijuana prior to and during her pregnancy. (*Id.* at 3). Dr. Hirsch  
27 further states that, in his opinion, Plaintiff Rosales' prior pregnancy history and marijuana  
28 use did not cause her premature delivery or rupture of membranes. (*Id.* at 4). Instead, he

1 asserts that the rear-end accident she was involved in caused her preterm premature rupture  
2 of membranes and the subsequent need for a c-section. (*Id.*)

### 3 **1. Sufficient Facts and Data**

4 Defendant first argues that Dr. Hirsch’s opinions are not based on sufficient facts or  
5 data because he considered only post-accident records in developing his opinions.  
6 (Doc. 27 at 12).

7 Rule 702 dictates that an expert’s opinion be “based on sufficient facts or data.”  
8 Fed. R. Evid. 702 (c). “A trial court should admit medical expert testimony if physicians  
9 would accept it as useful and reliable,” but it need not be conclusive because “medical  
10 knowledge is often uncertain.” *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010).  
11 Where the foundation is sufficient, the litigant is “entitled to have the jury decide upon [the  
12 experts’] credibility, rather than the judge.” *Id.* Furthermore, “[w]here, as here, the  
13 experts’ opinions are not the ‘junk science’ Rule 702 was meant to exclude, the interests  
14 of justice favor leaving difficult issues in the hands of the jury and relying on the safeguards  
15 of the adversary system—vigorous cross-examination, presentation of contrary evidence,  
16 and careful instruction on the burden of proof[.]” *Wendell v. GlaxoSmithKline LLC*, 858  
17 F.3d 1227, 1237 (9th Cir. 2017). In other words, when the opponent’s arguments go to the  
18 weight of an expert’s opinion, rather than its admissibility, the Court should not exclude  
19 the expert but allow the adversarial process to test the credibility of their opinion as it is  
20 the jury, not the Court, who judges credibility. *Updike, v. Am. Honda Motor Co. Inc., et*  
21 *al.*, 2024 WL 4182232, at \*4, \*12 (D. Ariz. Sept. 13, 2024) (citations omitted).

22 Here, the Court finds that Dr. Hirsch relied on sufficient facts and data to reach his  
23 opinions. He reviewed the extensive medical records in this case from many different  
24 hospitals and health care centers. (Doc. 27-12 at 1). Indeed, as Plaintiffs note, these  
25 records included information about Plaintiff Rosales’ prior pregnancies and miscarriage.  
26 (Doc. 33-8 at 1; Doc. 35 at 2). While, as Defendant argues, Dr. Hirsch never physically  
27 examined Rosales, (Doc. 27 at 7), this argument goes to the weight of his opinion, not its  
28 admissibility. *See Williams v. Daszko*, 2018 WL 2684314, at \*6 (E.D. Cal. June 5, 2018)



1 (holding that medical expert opinions that do not include the expert's physical examination  
2 of the patient are still "based on sufficient facts and data" and that challenges to such  
3 opinions "go to weight, not admissibility").

4 Dr. Hirsch also states in his affidavit that "[a]s a practicing Obstetrician and  
5 Gynecologist of over fifty (50) years, I have evaluated, treated, and made management  
6 decisions for numerous patients with symptomology such as those [Plaintiff Rosales]  
7 presented. (Doc. 33-1 at 1). The foundation upon which Dr. Hirsch uses to support his  
8 opinions is sufficient. *See Joiner*, 522 U.S. at 142. So, this evidence "should be attacked  
9 by cross examination, contrary evidence, and attention to the burden of proof [rather than]  
10 exclusion." *Primiano*, 598 F.3d at 564.

## 11 **2. Alternative Explanations**

12 Defendant also argues that the Court should exclude Dr. Hirsch as he failed to  
13 consider alternative explanations for Plaintiffs injuries. (Doc. 27 at 13). Not so.

14 This argument relies on the "differential diagnosis" sub-body of *Daubert* law which  
15 has been endorsed by the Ninth Circuit. Differential diagnosis is "the determination of  
16 which of two or more diseases with similar symptoms is the one from which the patient is  
17 suffering, by a systematic comparison and contrasting of the clinical findings." *Clausen v.*  
18 *M/V NEW CARISSA*, 339 F.3d 1049, 1057 (9th Cir. 2003). "The first step in the diagnostic  
19 process is to compile a comprehensive list of hypotheses that might explain the set of  
20 salient clinical findings under consideration. The issue at this point in the process is which  
21 of the competing causes are generally capable of causing the patient's symptoms or  
22 mortality." *Clausen*, 339 F.3d at 1057–58.

23 The second step is for the expert to "engage in a process of eliminating or ruling out  
24 the identified potential causes." *Stanley v. Novartis Pharms. Corp.*, 11 F. Supp. 3d 987,  
25 1001 (C.D. Cal. 2014) "When an expert rules out a potential cause in the course of a  
26 differential diagnosis, the 'expert must provide reasons for rejecting alternative hypotheses  
27 using scientific methods and procedures and the elimination of those hypotheses must be  
28 founded on more than subjective beliefs or unsupported speculation.' " *Messick*, 747 F.3d



1 at 1198 (citing *Clausen*, 339 F.3d at 1058). “A district court is justified in excluding  
 2 evidence if an expert ‘utterly fails . . . to offer an explanation for why the proffered  
 3 alternative cause’ was ruled out.” *Clausen*, 339 F.3d at 1058.

4 Here, the Court finds that Dr. Hirsch did not “utterly fail” to offer an explanation  
 5 for why alternative causes were ruled out. *See id.* Dr. Hirsch relied on Plaintiff Rosales  
 6 extensive post-accident medical records, which include her past obstetrical history, such as  
 7 a miscarriage and a second pregnancy that resulted in a c-section at 39 gestational weeks  
 8 as well as her use of marijuana prior to and during her pregnancy. (Doc. 33-1 at 3). During  
 9 his deposition, Dr. Hirsch stated that he did not include information about Plaintiff Rosales’  
 10 bacterial vaginosis because it does not cause a premature delivery or rupture of membranes  
 11 as it is not an “external infection.” (Doc. 33-2 at 5–6). This testimony shows that Dr.  
 12 Hirsch was aware of this condition but ruled it out. *Stanley*, 11 F. Supp. 3d at 1001. He  
 13 also considered Plaintiff Rosales’ marijuana use but concluded that, because she was not  
 14 consistently smoking marijuana during this pregnancy, there would be no detrimental  
 15 effect to the pregnancy. (Doc. 33-2 at 3). Again, Dr. Hirsch considered, but disregarded,  
 16 this potential cause. *See Clausen*, 339 F.3d at 1058. So, based on the record before it, the  
 17 Court concludes that Dr. Hirsch did not fail to consider alternative explanations for  
 18 Plaintiff’s injuries. *Id.* To the extent Defendant argues he did not “adequately rule out”  
 19 alternative causes for Plaintiff Rosales’ injuries, this is a credibility determination that goes  
 20 to the weight of his opinions, not their admissibility. *See Lopez v. Johnson & Johnson*, 654  
 21 F. Supp. 3d 997, 1007 (C.D. Cal. 2023).

### 22 **3. The Reasonableness of Plaintiff’s Medical Expenses**

23 Defendant argues lastly that Dr. Hirsch cannot opine on the reasonableness of  
 24 Plaintiffs’ medical expenses because he is not licensed to practice in Arizona.  
 25 (Doc. 27 at 14–15).

26 In Dr. Hirsch’s report, he lists numerous records he has reviewed, but these all  
 27 appear to be Plaintiff Rosales’ records. (Doc. 27-12 at 2). In his deposition, Hirsch was  
 28 asked whether he makes any statement in his report regarding Plaintiff A.T.’s NICU

1 records, to which he said, “not in the report.” (Doc. 27-14 at 22). He also admits that he  
 2 did not receive any records reflecting care and treatment for Plaintiff A.T. (Doc. 27-13  
 3 at 16). He states that he received hospital records that “talked about [A.T.],” however.  
 4 (*Id.*) So, it is unclear what, if any, of Plaintiff A.T.’s medical records or associated billing  
 5 records he reviewed. This places Defendants at a disadvantage and the Court finds Dr.  
 6 Hirsch should not opine on whether Plaintiff A.T.’s cost of treatment was reasonable  
 7 without explaining what he examined or otherwise considered in forming this opinion. *See*  
 8 Fed. R. Evid. 702(c). So, Plaintiffs may not proffer Dr. Hirsch for the reasonableness of  
 9 A.T.’s treatment or costs without more. *See Lust*, 89 F.3d at 598 (stating that the proponent  
 10 of expert testimony has the ultimate burden of showing that the expert is qualified and that  
 11 the proposed testimony is admissible under Rule 702).

12 Dr. Hirsch can testify about the reasonableness of Plaintiff Rosales’ treatment and  
 13 expenses, however, since this testimony is based on his knowledge and experience as well  
 14 as sufficient facts. *See Hankey*, 203 F.3d at 1169; *see also Longoria v. Kodiak Concepts*  
 15 *LLC*, 2021 WL 1100373, at \*11 (D. Ariz. Mar. 23, 2021) (“The proponent of expert  
 16 testimony need only lay a ‘minimal foundation’ of ‘knowledge, skill, experience, training,  
 17 or education’ in the topic at hand.”) (citing *Thomas v. Newton Int’l Enterprises*, 42 F.3d  
 18 1266, 1269 (9th Cir. 1994)). Even if Dr. Hirsch was a lay witness, which he is not, he  
 19 could likely testify to the reasonable expenses incurred by Plaintiff Rosales. *See* Fed. R.  
 20 Evid. 701(a) (stating that lay witness testimony must be “rationally based on the witness’s  
 21 perception.”). Dr. Hirsch is not a lay witness, however. He is an expert with over fifty-  
 22 years of experience in the medical field—specifically, as a practicing Obstetrician and  
 23 Gynecologist. (Doc. 33-1 at 1). He has vast experience treating patients such as Plaintiff  
 24 Rosales. (*Id.*) When asked about the reasonableness of Plaintiff’s expenses and treatments,  
 25 he stated that they were appropriate. (Doc. 33-2 at 13–14). This evidence is ripe for  
 26 vigorous cross-examination—not exclusion. *See Primiano*, 598 F.3d at 564.

27 In sum, Dr. Hirsch can testify to the reasonableness of Plaintiff Rosales’ treatment  
 28 and medical expenses, but not Plaintiff A.T.’s, because he has not reviewed records

1 reflecting her care or treatment.

2 **B. Dr. Shayya**

3 Similar to its previous arguments, Defendant also argues that (1) Dr. Shayya's  
4 expert medical opinions do not rely on sufficient facts and data and (2) Dr. Shayya failed  
5 to consider reasonable alternative causes for Plaintiff Rosales' injuries. (Doc. 28 at 7, 10).

6 Dr. Shayya is a board-certified neurologist who Plaintiffs retained as a neurology  
7 expert. (Doc. 34 at 3). Dr. Shayya states that he has reviewed the following records related  
8 to this matter: SimonMed Imaging records from March 12, 2021; Banner Thunderbird  
9 Medical Center records from September 30, 2020; Innovative Pain Solutions records from  
10 March 9, 2021; and Arizona Neurology and Sleep Center records from July 15, 2021.  
11 (Doc. 28-14 at 1-4). Dr. Shayya presents his opinions as answers to questions in the  
12 following format:

13 **1. To a reasonable degree of medical probability, was Ms. Rosales**  
14 **injured as a result of the September 29, 2020 motor vehicle collision? If**  
15 **so, what injuries did she sustain?** Yes, Ms. Rosales was injured as a result  
16 of the September 29, 2020 motor vehicle collision to a reasonable degree of  
17 medical probability. She suffered injuries of headaches, neck pain, and  
lumbar pain. She was ultimately diagnosed with headaches, cervical  
radiculopathy, and lumbar radiculopathy.

18 **2. To a reasonable degree of medical probability, what (if any) treatment**  
19 **noted in the attached records was related to the injuries sustained by**  
20 **Ms. Rosales in the September 29, 2020 motor vehicle collision?** The  
21 treatment that Ms. Rosales received from Innovative Pain Solutions, Banner  
22 Thunderbird Hospital, and Arizona Neurology and Sleep Center were related  
to the injuries sustained by Ms. Rosales, to a reasonable degree of medical  
probability.

23 **3. Was the treatment received by Ms. Rosales for injuries caused by the**  
24 **September 29, 2020 motor vehicle collision reasonable and customary?**  
25 Yes, the treatment Ms. Rosales received for injuries caused by the September  
29, 2020 trauma was reasonable and customary.

26 **4. Was the cost of the treatment received by Ms. Rosales for injuries**  
27 **caused by the September 29, 2020 motor vehicle collision reasonable and**  
28 **customary?** Yes, the cost of the treatment received by Ms. Rosales to  
injuries related to the September 29, 2020 motor vehicle accident were  
reasonable and customary.

1       **5. Did Ms. Rosales aggravate any pre-existing condition as a result of the**  
 2       **September 29, 2020 motor vehicle collision? If so, what was that**  
 3       **condition?** No, Ms. Rosales did not aggravate any pre-existing conditions as  
 a result of the September 29, 2020 motor vehicle collision.

4       **6. To a reasonable degree of medical probability, do you believe that Ms.**  
 5       **Rosales will experience future discomfort and pain related to injuries**  
 6       **she sustained as a result of the September 29, 2020 motor vehicle**  
 7       **collision?** Based upon her positive response to physical therapy and  
 8       headache medications, Ms. Rosales should not experience any future  
 discomfort and pain related to the injuries sustained as a result of the  
 September 29, 2020 motor vehicle accident.

9       **7. To a reasonable degree of medical probability, are injuries Ms.**  
 10       **Rosales sustained in the September 29, 2020 motor vehicle collision**  
 11       **permanent? If so, would you describe any permanent disability rating**  
 12       **pursuant to relevant American Medical Association guidelines?** The only  
 13       injury Ms. Rosale sustained as a result of the September 29, 2020 motor  
 14       vehicle accident that may be permanent is her left upper facial paresis.  
 Permanent disability rating, based upon the 6th edition of the American  
 Medical Association guidelines, is between 1 and 3% whole person  
 impairment.

15       **8. To a reasonable degree of medical probability, will Ms. Rosales**  
 16       **require any additional or future medical treatment? If so, what**  
 17       **treatment do you believe she will require?** Ms. Rosales will not require  
 18       any additional or future medical treatment, to a reasonable degree of medical  
 probability.

19       (*Id.* at 4–5 (emphasis in original)).

20       After this initial report, Dr. Shayya furnished a rebuttal report in which he reviewed  
 21       an additional medical record from Plaintiff's June 13, 2019, visit with Dr. Habib Khan at  
 22       the AZ Institute of Neurology and Polysomnography. (Doc. 28-15 at 1). His expert  
 23       opinions did not change based on these new records. (*Id.* at 4–6).

24       Dr. Shayya was also deposed. (Doc. 28-16). Dr. Shayya was asked if he ever  
 25       requested additional records from Plaintiffs. He answered that, if there were additional  
 26       records, his "expectation would be that [she] would send them over for review." (*Id.* at 3).  
 27       After this, Dr. Shayya admitted that he has never examined Plaintiff Rosales, spoken with  
 28       her or knows what she looks like. (*Id.* at 4). Later in the deposition, Dr. Shayya was asked

1 if he had reviewed Plaintiff Rosales' January 18, 2019, records from HonorHealth John C.  
 2 Lincoln Medical Center. He had not, and was surprised to learn why she had to visit this  
 3 medical center:

4 Q: On January 18, 2019, according to HonorHealth John C. Lincoln  
 5 Medical Center, Ms. Rosales was brought to the emergency room by  
 6 ambulance after a motor accident with probable ejection.

7 A: **What date was that?**

8 Q: January 18, 2019.

9 A: **Okay.**

10 Q: She was complaining of confusion and back pain. Her car was struck,  
 11 rolled over, and then struck by a bus. She was found beside the car  
 12 confused and did not remember the accident. She was hysterical and  
 13 crying of pain, gasping for air. She was intubated. She had marked  
 14 swelling of the left forehead and face. Her condition was guarded and  
 15 critical. She was noted to have a large anterior hematoma on her  
 16 forehead. Head, brain, cervical CT scans demonstrated a large left  
 17 frontotemporal convexity, subgaleal hematoma without underlying  
 18 fracture or intracranial hemorrhage, and an acute nondisplaced  
 19 fracture involving the left C6 lamina.

20 *You didn't know that, did you?*

21 A: **No.**

22 Q: [Plaintiffs' Counsel] didn't give you those records, did she?

23 A: **No.**

24 (*Id.* at 14–15) (emphasis added).

25 The Court finds that Dr. Shayya can testify to these opinions, except for his fifth  
 26 opinion, because he was unaware of Plaintiff's previous accident in which she was likely  
 27 ejected from her vehicle. That information would have been pertinent to his opinion about  
 28 whether Plaintiff Rosales had a pre-existing condition.

Rule 702 dictates that an expert's opinion be "based on sufficient facts or data."  
 Fed. R. Evid. 702(c). "A trial court should admit medical expert testimony if physicians  
 would accept it as useful and reliable," but it need not be conclusive because "medical  
 knowledge is often uncertain." *Primiano*, 598 F.3d at 565. The trial court "must assure  
 that the expert testimony both rests on a reliable foundation and is relevant to the task at

1 hand.” *Id.* at 564 (internal citation and quotations omitted).

2 Expert testimony that “neglects to consider a hypothesis that might explain the  
3 clinical findings under consideration may [] be unreliable.” *Clausen*, 339 F.3d at 1058.  
4 “A district court is justified in excluding evidence if an expert ‘utterly fails . . . to offer an  
5 explanation for why the proffered alternative cause’ was ruled out.” *Id.* However, “[a]  
6 medical expert’s opinion based upon differential diagnosis normally should not be  
7 excluded because the expert has failed to rule out every possible alternative cause of a  
8 plaintiff’s illness.” *Stanley*, 11 F. Supp. 3d at 1001 (quoting *Cooper v. Smith & Nephew,*  
9 *Inc.*, 259 F.3d 194, 202 (4th Cir.2001)).

10 Generally, an expert witness is not required to “rule out every potential cause in  
11 order to satisfy *Daubert*, as long as the expert’s testimony address[es] obvious alternative  
12 causes and provide[s] a reasonable explanation for dismissing specific alternate factors  
13 identified by the defendant.” *Id.* (quoting *In re Fosamax Products Liab. Litig.*, 647  
14 F.Supp.2d 265, 278 (S.D.N.Y. 2009)). So, the argument that an expert did not adequately  
15 rule out additional factors is a credibility determination that goes to the weight, not the  
16 admissibility, of their opinions which should be addressed by cross-examination during  
17 trial—not exclusion. *See id.* (citations omitted); *see also Ferguson v. Riverside Sch. Dist.*  
18 *No. 416*, 2002 WL 34355958, at \*9 (E.D. Wash. Feb. 6, 2002) (“[T]he defendants’  
19 contention that [the expert] improperly ignored or discounted alternative causes will be the  
20 proper subject of cross-examination, but does not make his testimony inadmissible.”).

21 First, the Court finds that Dr. Shayya’s medical opinions are based on sufficient  
22 facts and data. *See* Fed. R. Evid. 702(c). Dr. Shayya has reviewed a plethora of Plaintiff  
23 Rosales’ records to support his opinions, including: SimonMed Imaging records from  
24 March 12, 2021; Banner Thunderbird Medical Center records from September 30, 2020;  
25 Innovative Pain Solutions records from March 9, 2021; and Arizona Neurology and Sleep  
26 Center records from July 15, 2021. (Doc. 28-14 at 1–4). He is also a board-certified  
27 neurologist. (Doc. 34 at 3). Based on his experience and review of Plaintiff Rosales’  
28 records, he was able to link the accident to her injuries. (*See* Doc. 28-14 at 4–5). For



1 instance, Dr. Shayya concluded that Plaintiff Rosales “was injured as a result of the  
2 September 29, 2020, motor vehicle collision to a reasonable degree of medical probability.  
3 She suffered injuries of headaches, neck pain, and lumbar pain. She was ultimately  
4 diagnosed with headaches, cervical radiculopathy, and lumbar radiculopathy.” (*Id.* at 4).  
5 Because Dr. Shayya rigorously reviewed Plaintiff Rosales’ records in this case, the Court  
6 finds that his opinions are based on sufficient facts and data and refuses to exclude him on  
7 these grounds. *See* Fed. R. Evid. 702(c).

8 Next, the Court finds that, because Dr. Shayya had insufficient information on the  
9 possible existence of a pre-existing condition, his testimony must be limited—but not  
10 excluded. Dr. Shayya failed to consider Plaintiff’s 2019 car accident which resulted in  
11 “probable ejection.” (Doc. 28-16 at 14–15). In fact, Dr. Shayya seemed surprised to learn  
12 of this accident and admitted that he did not know about it. (*See id.*) So, the Court will not  
13 allow Dr. Shayya to testify as to his fifth opinion: that Plaintiff Rosales “did not aggravate  
14 any pre-existing conditions as a result of the September 29, 2020, motor vehicle collision.”  
15 (Doc. 28-14 at 5).

16 However, Dr. Shayya may testify to his other opinions regarding the accident and  
17 Plaintiff Rosales’ injuries as he was not required to “rule out every potential cause in order  
18 to satisfy *Daubert*.” *Stanley*, 11 F. Supp. 3d at 1001. Dr. Shayya, in his rebuttal report,  
19 reviewed additional medical records from Plaintiff’s June 13, 2019, visit with Dr. Habib  
20 Khan at the AZ Institute of Neurology and Polysomnography. (Doc. 28-15 at 1). This  
21 record includes evidence that Plaintiff Rosales was experiencing ongoing headaches at  
22 least twice a week, associated with lightheadedness and vision loss. (*Id.*) This record also  
23 notes that she suffered a concussion because of a car accident in January of 2019—which  
24 is likely the same incident as the previous accident which occurred on January 18, 2019,  
25 that Defendant claims he failed to consider. (*Id.*; Doc. 28-12 at 2). His remaining expert  
26 opinions did not change based on this review of Dr. Khan’s records. (Doc. 28-15 at 4–6).  
27 So, Dr. Shayya was aware of Plaintiff Rosales’ history of headaches and that she suffered  
28 a concussion from a previous accident. (*See id.*) Knowing this, he still attributes Plaintiff




1 Rosales' current injuries to the September 29, 2020, accident—not the 2019 accident. (*See*  
2 *id.*) Because Dr. Shayya was aware of Plaintiff Rosales' history of headaches as well as  
3 her concussion, the Court finds that his failure to rule out the 2019 accident is a credibility  
4 determination that goes to the weight, not the admissibility, of his opinions, which should  
5 be addressed by cross-examination during trial. *See Stanley*, 11 F. Supp. 3d at 1001.

6 Thus, the Court will allow Dr. Shayya to testify to most of his purported opinions,  
7 except for his fifth opinion: that Plaintiff Rosales “did not aggravate any pre-existing  
8 conditions as a result of the September 29, 2020, motor vehicle collision.” (Doc. 28-15  
9 at 5).

10 Accordingly,

11 **IT IS ORDERED** that Defendant's Motion to Exclude Dr. Hirsch (Doc. 27) and  
12 Dr. Shayya (Doc. 28) are **GRANTED in part and DENIED in part** as set forth above.

13 Dated this 25th day of September, 2024.

14  
15  
16   
17 Honorable Diane J. Humetewa  
18 United States District Judge  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28